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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 241

SARKES TARZIAN, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 1–6) is reported at 374 F. 2d 734. The Board's decision and order (J.A. 115–127, 194–198) [1] are reported at 157 NLRB 1193.

JURISDICTION

The decision and judgment of the court of appeals were entered on February 27, 1967 (Pet. App. B 1). A petition for rehearing was denied on April 6, 1967, and a decree was entered on April 7, 1967 (Pet. App. B 7, 8). The petition for a writ of certiorari was filed on

[1] "J.A." references are to the portions of the record printed as a joint appendix for the court below and filed with the petition.

June 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's findings that the employer restrained and coerced its employees and discriminated against them, in violation of Sections 8(a) (1) and (3) of the National Labor Relations Act, are supported by substantial evidence.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are printed in Appendix A to the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

During 1962, International Brotherhood of Electrical Workers, AFL–CIO (the Union) started its campaign to organize the employees at petitioner Company's plant, located near Bloomington, Indiana.[2] During the course of the Union's campaign, Company President Sarkes Tarzian made numerous speeches to the employees emphasizing his strong opposition to the Union (J.A. 32–35, 61–63). Tarzian and other

[2] On October 5, 1962, the Union filed a petition under Section 9 of the Act for certification as the employees' bargaining representative, and, on January 25, 1963, the Board conducted an election, which the Union lost. The election was set aside because *inter alia*, of the unfair labor practices involved herein. (J.A. 9–11, 74–75, 126.)

members of management implemented this opposition by the conduct summarized below:

1. THREATS, COERCION AND RESTRAINT

Company representatives, in an attempt to defeat the employees' organizational drive, solicited employees to engage in unlawful spying and other anti-union conduct; interrogated employees concerning their union activities and that of their co-workers; and threatened employees with discharge and other reprisals if they joined or assisted the Union (J.A. 75–109, 111, 116). Thus, Leola Hostetter, an employee enlisted by the Company in its anti-union campaign, was given the task of canvassing a list of non-supervisory group leaders in order to identify for Plant Manager Polley those who were either pro-union or anti-union (J.A. 77–78, 96; 380–381). Mrs. Tarzian, vice-president of the Company, subsequently instructed Plant Manager Polley, in the presence of Hostetter, that those employees who were "disloyal" because of their union adherence were not to be promoted (J.A. 96; 504, 506–507). Later, Company General Counsel Woods requested Hostetter to linger in the plant restroom, listen to the conversations of the girls, and report back their union sentiments (J.A. 80, 96–97; 388–390, 485, 497). In like vein, Production Manager Sloan solicited other employees to disclose pertinent organizational information, and warned them that their pro-union activities might result in their discharge (J.A. 103, 14–15, 22; 255–256, 262–263). The Company also used Hostetter to make anti-union speeches to em-

ployees at meetings where Tarzian and his wife spoke (J.A. 81–82; 382–387).[3]

Employee Hattie Logie was similarly recruited by the Company in its campaign to defeat the Union. The Company arranged for Logie to use her position as a member of the Union's organizing committee to gather and report information about the Union's activities and plans (J.A. 76–80, 85–96, 98–102). Logie started this activity after her foreman warned that she would be out of a job if her record of absenteeism continued and then suggested that she could safeguard her job by switching her allegiance to the Company (J.A. 76–77, 94–96; 392–397).[4] After Company President Tarzian agreed to have employee Logie "guarded" against union reprisal while she was spying and to send her to Yakima, Washington when the election was over, she collected employee authorization cards and turned them over to Company Supervisor Haynes before forwarding them to the union organizers (J.A. 78–79, 88, 98; 395–397, 483–484). During the year or so that Logie engaged in espionage for the Company, she reported many times to manage-

[3] Additionally, Mrs. Tarzian authorized Hostetter to use Company supplies to make anti-union signs and badges (J.A. 81–82; 383–384). General Counsel Woods asked Hostetter to arrange for the printing of some 2000 "Vote No" buttons. Woods thereafter reimbursed her, with the understanding that this money was for expenses incurred during the campaign (J.A. 82–83; 386–388, 438–439).

[4] Thus, Foreman Porter told Logie prior to the election (J.A. 394–395): "* * * go into the office and talk to them, because the Company could do more for [her] than what the Union was doing, and then the Company would have no reason to fire [her]."

ment officials on the progress of the Union's drive at the Indiana plant, as well as at other Tarzian plants located in Tennessee and Arkansas (J.A. 85–86, 88–91, 397–398, 400–419).[5] The Company not only rewarded Logie with cash payments ranging from $5 to $60, but also installed a special phone in her house and hired a private detective to protect her and enable her to report more effectively (J.A. 91, 99, n. 9; 412–414, 418–419). The Company also refrained from disciplining Logie for her absenteeism and tardiness (J.A. 480–482). Early in 1964, when Logie eventually threatened to disclose her role as Company spy if the promise to send her to Yakima was not fulfilled, the Company gave her two checks for travel expenses to California, and made extensive efforts to find work for her on the west coast (J.A. 85, 89, 92–93; 375–376, 378–379, 400, 409–410, 414–418, 455, 458, 463, 557–569).

2. THE DISCHARGE OF EMPLOYEE WILBER

Melville Wilber had been employed by the Company for nine years, during which time no complaints were made concerning his conduct or his work (J.A. 47, 104, 117; 214, 223). He assumed an active role in the Union's 1962 drive, and served on the organizing committee (J.A. 47, 104, 117; 214–216, 218–219). His pro-union efforts were well known to Company representatives (J.A. 51, 53–54, 119; 217–218, 294).[6] There-

[5] When the Union lost the election and thereafter filed objections based on the employer's pre-election conduct (see n. 2, *supra*), Company Counsel Woods instructed Logie to continue "to attend the union meetings, and spy on the union * * * [and discover] what they planned on doing" (J.A. 85; 397–399).

[6] Plant Manager Polley had "heard rumors that [Wilber] was pretty active in the union work" (J.A. 294).

after, Wilber's direct supervisor, Foreman Pearson, warned him "to stop talking union" because "there would be three people watching" him (J.A. 53–54, 119; 217). On October 16, 1962, shortly after Pearson's warning and the filing of the Union's representation petition with the Board, Wilber was discharged (J.A. 117–119, 104–105, 47–54). The Company claimed that Wilber was discharged because he had punched another employee's timecard.[7] However, other employees had similarly clocked in their co-workers and were not disciplined (J.A. 118, 104, 49–51; 202–203, 231, 251, 258, 268–269).[8] Further, the plant employees were generally unaware of any rule forbidding a person from clocking in a co-worker (J.A. 117, 49–50; 212, 223, 253, 257–258).[9] Although Wilber's foreman told him on October 16 that he would probably be called to the office and warned "never to do it again," Wilber was instead summarily discharged that same afternoon (J.A. 47–48, 117; 220–223, 226).

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[7] Wilber had punched the timecard of Mrs. East, his mother, just before 7:00 a.m. on October 16. She had gone home that morning to retrieve her misplaced dentures and had returned to the plant a few minutes after the 7:00 a.m. starting time, but before work commenced at her station (J.A. 48–50, 117, n. 5; 230, 248, 314–316, 321).

[8] Company supervisors, as well as Plant Manager Polley, knew of this practice; indeed, one foreman was repeatedly observed punching an employee's timecard (J.A. 118; 202–203, 231, 251).

[9] During the nine years that Wilber worked for the Company, one other employee was discharged for this infraction, in 1953. However, that employee had previously received at least one warning with respect to a violation of Company rules, and had been subsequently rehired (J.A. 118, 53; 310, 312).

3. THE REFUSAL TO REHIRE LOGIE

As noted above, Logie, with Company assistance, left for California early in 1964 (J.A. 92–93; 375–376, 378–379, 414–418, 458, 557–559, 563–569). In June 1964, Logie returned to Bloomington, Indiana, went immediately to the office of Company Counsel Woods, and asked if he would return her to her former position. Woods instead offered her a job in the personnel office, screening applicants concerning their union sympathies. Logie refused because she did not want to get involved in the "union business" again. Woods responded that she had "just better go to work for" another employer, "because that's what [the Company] wanted [her] to do" (J.A. 100; 419–422). Logie filed a formal job application form with the Company, but she was never offered reemployment (*ibid.*).

B. THE BOARD'S CONCLUSIONS AND ORDER, AND THE COURT OF APPEALS' DECISION

Upon the foregoing record, the Board concluded that petitioner, in opposing the Union's organization campaign, threatened, coerced and restrained its employees in violation of Section 8(a)(1) of the Act (J.A. 100–101, 116). The Board further concluded that petitioner violated Section 8(a)(3) of the Act by discharging employee Melville Wilber because of his pro-union activity (J.A. 117–119), and by refusing to rehire Hattie Logie because she would not accept a job which would have required her to interrogate prospective employees concerning their union sympathies and affiliations (J.A. 101–102, 116). The Board ordered petitioner to cease and desist from

the unfair labor practices found; to offer Wilber and Logie the jobs they would have had but for the discrimination against them; to reimburse them for any loss of earnings resulting from the discrimination; and to post appropriate notices (J.A. 112–114, 124–127, 194–198).

The court of appeals held that the "Board's findings that the Company committed several violations of Section 8(a)(1) were fully supported by the record" (Pet. App. B 3). The court further held that the "Board was justified in inferring that Wilber's discharge was motivated by his union activity and that his violation of the company rule was a pretext for discriminatory action" (Pet. App. B 5). Finally, the court held that the Company further violated Section 8(a)(3) by "attaching the discriminatory condition of union surveillance" to the tender of employment to Logie (Pet. App. B 6). Accordingly, the court enforced the Board's order in full (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 8) that the court of appeals, in sustaining the Board's unfair labor practice findings, failed to consider the record as a whole. However, an examination of the court's opinion (Pet. App. B 1–6) shows that this contention is without substance. The credited testimony, summarized in the Statement, fully supports the Board's findings.[10] Peti-

[10] Petitioner attempts to discredit the findings of the Trial Examiner, which the Board and the court below accepted, by pointing out that the Examiner had originally made certain findings favorable to the Company and then changed these findings after the reopened hearings. In this regard petitioner

tioner's attack on the substantiality of the evidence supporting these findings is principally based on the resolution of several questions of credibility made by the Board's Trial Examiner and subsequently adopted by the Board (Pet. 4–6, 8). There was, however, ample basis for these credibility determinations (J.A. 94–109) and, as the court below held (Pet. App. B 2), "the record as a whole * * * presents no exceptional circumstances" which would justify disturbing on review the Trial Examiner's resolutions of conflicting testimony. See *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408. In these circumstances, no issue warranting review by this Court is presented. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

2. Equally insubstantial is petitioner's assertion (Pet. 11–14) that the court of appeals applied an erroneous rule on burden of proof in sustaining the

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attempts to convey the impression that Hattie Logie gave the only significant testimony at the reopened hearings and that her testimony related solely to events subsequent to the election (Pet. 5). However, Leola Hostetter, who testified that prior to the election she had been recruited by the Company to spy on the Union and to give information concerning the union sympathies of other employees, also testified for the first time at the reopened hearings. In addition, Hattie Logie testified that, although she did not actually begin her spying for the Company until after the election, the threats to fire her and the agreements to reward her if she worked for the Company against the Union all occurred prior to the election (J.A. 392–397). The Trial Examiner found with regard to this new evidence that the Company's "position, testimony, and contentions here are absolutely ridiculous and untrue, and also shed considerable light in other aspects of this case and the general incredibility of the witnesses for the Company irrespective of the findings in my earlier Decision" (J.A. 95).

Board's finding as to reason for Wilber's discharge. It is settled that the Board was "not compelled to accept" the employer's assigned reason for discharging an employee "when there is reasonable cause for believing that the ground put forward by the employer was not the true one, and that the real reason was the employer's dissatisfaction with the employee's union activity." *The Great Atlantic and Pacific Tea Company* v. *National Labor Relations Board*, 354 F. 2d 707, 709 (C.A. 5). See *National Labor Relations Board* v. *Walton Mfg. Co., supra.*[11] The Board and the court below merely applied that principle here. Thus, the Board, on the basis of the evidence in this case, rejected as a pretext the Company's asserted non-discriminatory reason for discharging employee Melville Wilber. As the court below properly con-

[11] Accord: *National Labor Relations Board* v. *Link-Belt Co.*, 311 U.S. 584, 602; *National Labor Relations Board* v. *Whitin Machine Works*, 204 F. 2d 883, 885 (C.A. 1); *National Labor Relations Board* v. *Great Eastern Color Lithographic Corp.*, 309 F. 2d 352, 355 (C.A. 2), certiorari denied, 373 U.S. 950; *National Labor Relations Board* v. *Buitoni Foods Corp.*, 298 F. 2d 169, 174 (C.A. 3); *National Labor Relations Board* v. *Associated Naval Architects*, 355 F. 2d 788, 792 (C.A. 4); *National Labor Relations Board* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6); *Nachman Corp* v. *National Labor Relations Board*, 337 F. 2d 421, 423 (C.A. 7); *National Labor Relations Board* v. *South Rambler Co.*, 324 F. 2d 447, 449 (C.A. 8); *National Labor Relations Board* v. *Security Plating Co.*, 356 F. 2d 725, 727–728 (C.A. 9); *Betts Baking Co.* v. *National Labor Relations Board*, 65 LRRM 2568, 2571–2572.

Application of this principle will, of course, produce different results depending on the particular facts of each case. The cases cited by petitioner (Pet. 8), in an attempt to show a conflict among the circuits, merely involve different factual situations.

cluded (Pet. App. B 5), the circumstances attending Wilber's summary firing—in the context of petitioner's intense hostility toward the Union—justified the finding that he was fired because of his pro-union activity.[12]

3. Contrary to petitioner's contention (Pet. 14–15, 7), the Board's findings of unlawful threats, coercion, and restraint are not predicated on petitioner's so-called "captive audience speeches" to its employees, or management's threat to fire an employee who refused to attend one speech.[13] There is ample other evidence to support the Board's Section 8(a)(1) findings (see Pet. App. B 4). In view of the extensive nature of petitioner's threats, surveillance, and promises of economic benefit, there is no substance to petitioner's contention (Pet. 14–15) that its conduct merely involved "speech" protected by Section 8(c) of the Act.

[12] The language quoted and emphasized in the petition (Pet. 12–13) from *National Labor Relations Board* v. *I. V. Sutphin*, 373 F. 2d 890 (C.A. 5), was subsequently deleted by the court upon the Board's petition for rehearing (see 373 F. 2d at 894). Accordingly, that case does not establish any principle different from that discussed above.

[13] As noted (n. 2, *supra*), the Board not only found the unfair labor practices here involved, but also sustained the Union's objections to the January 1963 election. The Board relied on the threat to the employee for failure to attend a management speech merely as a ground for setting aside the election, and not as a basis for its 8(a)(1) findings (see J.A. 106–107). As the court below pointed out (Pet. App. B 2, n. 3), the Board's action in setting aside the election was not before it for review in this proceeding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
FRANK H. ITKIN,
Attorney,
National Labor Relations Board.

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